

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDREW LAYMAN, a married man,

Plaintiff,

v.

THE PERMANENT PORTFOLIO
FAMILY OF FUNDS, INC., a Maryland
Corporation,

Defendant.

No. 2:05-cv-980 MJP

**DEFENDANT'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

**ORAL ARGUMENT REQUESTED
Noted for Hearing: September 16, 2005**

Defendant, Permanent Portfolio Family of Funds, Inc. ("PPFF") files this opposition to the Motion for Partial Summary Judgment ("Motion") filed by Plaintiff Andrew Layman.

I. INTRODUCTION

This case is about a disingenuous effort by Plaintiff Andrew Layman to avoid his obligations under a Common Stock Purchase Warrant ("Warrant") entitling PPFF to purchase certain shares of Symantec Corporation ("Symantec") stock. Since PPFF sent Mr. Layman a written Election to Exercise its rights to purchase the Symantec stock on March 10, 2005, Mr. Layman has engaged in a bad faith effort aimed at frustrating the ability of PPFF to obtain the Symantec shares. Mr. Layman ignored or delayed responding

1 to efforts by PPFF to “close” the stock purchase in March 2005. Further, after PPFF was
2 advised by State Street Bank and Trust Company (“State Street”), the Custodian for PPFF
3 and the holder of the Symantec stock covered by Warrant, that PPFF could not take
4 possession of the shares until Mr. Layman delivered executed stock power forms, Mr.
5 Layman refused to comply with his obligation to provide such documents. In late March
6 2005, PPFF generated a check made payable to Mr. Layman for the purchase price of the
7 Symantec shares and waited for Mr. Layman to perform the acts necessary to facilitate the
8 closing of the stock purchase. Ultimately, Mr. Layman contacted PPFF and proposed a
9 “closing” date of May 12, 2005 – a date on which he was scheduled to be in or near San
10 Francisco, California, which is the location of the headquarters of PPFF. Mr. Layman
11 filed the underlying lawsuit in state court two days before the scheduled closing date – May
12 10, 2005. PPFF removed the case to this Court, responded to Mr. Layman’s Complaint,
13 and filed several counterclaims, including claims founded on equitable doctrines.

14 Now, Mr. Layman asks this Court to grant him partial summary judgment on the
15 ground that PPFF failed to provide him with the purchase price and the original Warrant on
16 or before a supposed “deadline.” The Motion should be denied for several reasons.

17 First, Mr. Layman’s contention that there are no undisputed facts concerning these
18 matters is groundless. Indeed, there are several material facts that are very much in
19 dispute. Most of these factual issues center on the manner in which the parties interpreted
20 the terms of the Warrant itself. In his Motion, Mr. Layman makes little mention of the
21 language of the Warrant. His disregard for the terms of the Warrant is not surprising, given
22 that the language of the Warrant, and the related conduct of the parties, undermines his
23 Motion. Significantly, the Warrant does not state that the stock purchase must be closed on
24 or before April 6, 2005. In fact, the Warrant is silent or ambiguous regarding a “deadline”
25 for closing the stock purchase transaction once PPFF provides Mr. Layman with its
26 Election to Exercise. Moreover, the conduct of the parties strongly evidences that neither

1 Mr. Layman nor PPFF understood April 6, 2005 to be such a "deadline."

2 Mr. Layman's related assertion that the request by PPFF that he execute stock
3 power forms represents "a departure from procedure described in the Warrant" also is
4 disputed. The Warrant contains explicit requirements (particularly at Articles 2.7, 4 and 5)
5 that obligate Mr. Layman to execute the stock powers. PPFF's request that Mr. Layman
6 deliver the executed stock powers was entirely consistent with the obligations undertaken
7 and contemplated by the parties when the Warrant was executed. Mr. Layman's apparent
8 contention that the Warrant permitted him to refuse to deliver the stock power forms and
9 avoid meeting with PPFF representatives to "close" the stock purchase transaction until
10 after a supposed "deadline," and thereupon, assert that the rights of PPFF under the
11 Warrant are extinguished, lacks merit. Further, Mr. Layman's contention that PPFF drafted
12 the Warrant is disputed. There is abundant evidence that Mr. Layman participated actively
13 in the preparation of the Warrant and that he was represented by counsel with respect to the
14 negotiation of the Warrant.

15 Second, the case law authority cited by Mr. Layman does not support his Motion.
16 In general, the cases cited by Mr. Layman merely stand for the proposition that the terms of
17 an option contract must be strictly complied with by the parties. This general proposition
18 is not contested in the context of the instant Motion. The authorities relied upon by Mr.
19 Layman, none of which arises on analogous facts, say nothing about whether Mr. Layman
20 performed his obligations under the Warrant and acted consistently with the agreement of
21 the parties. Moreover, on close examination, the cases cited by Mr. Layman, support the
22 position of PPFF that PPFF timely exercised its rights under the Warrant and that Mr.
23 Layman is obligated to perform by delivering the stock powers and accepting the purchase
24 price.

25 Third, the Motion by Mr. Layman should also be rejected as premature because the
26 parties have not engaged in any discovery with respect to the material elements of this

1 dispute. As described below, this dispute centers on questions related to certain
 2 interactions and understandings of the parties, including understandings that are evidenced
 3 by communications that occurred after PPFF sent Mr. Layman its written Election to
 4 Exercise on March 10, 2005. The evidence regarding those matters should be explored and
 5 established during discovery. Appropriate discovery will leave no doubt that PPFF (not
 6 Mr. Layman) is entitled to summary judgment. Nonetheless, for now, PPFF respectfully
 7 submits that these questions should be deferred by the Court.

8 **II. COUNTERSTATEMENT OF FACTS**

9 PPFF is a registered investment company that consists of four separate mutual fund
 10 portfolios, each with its own separate investment objective and policies. PPFF currently
 11 has approximately \$ 400 million in total net assets. The shares of PPFF are owned by
 12 thousands of individual mutual fund investor accounts, including accounts held by Mr.
 13 Layman and his wife.

14 In 1990, PPFF's former President and Chairman, Terrence Michael Coxon
 15 ("Coxon"), in collaboration with his attorney, Richard Rolnick ("Rolnick"), Mr. Layman
 16 and Mr. Layman's attorney, Mr. Epstein, conceived of the idea of a "deep-in-the-money
 17 call option on [Layman's] low basis shares" in Symantec stock. *See* Declaration of Lisa
 18 Richman, filed herewith, ("Richman Decl.") at ¶¶ 5, 10 and Exhibits 4 and 9. In addition
 19 to his position at PPFF, Coxon and Terry Coxon, Inc., a corporation wholly owned by
 20 Coxon, were the general partners of World Money Managers, investment adviser to PPFF
 21 at the time. Terry Coxon, Inc. had certain private investment advisory clients, including
 22 Mr. Layman. Coxon was interested in assisting Mr. Layman to formulate a deal whereby
 23 Mr. Layman "raise[d] cash," "remove[d] the price risk of the [Symantec] stock from his
 24 own portfolio" and "defer[red] recognition of gain" in order to avoid certain tax
 25 consequences. *See* Exhibit 4. Coxon convinced the Board of Directors of PPFF that the
 26 Warrant would be a good investment for PPFF, whereupon Coxon, Rolnick, Mr. Layman

1 and Mr. Layman's attorney, drafted the Warrant. *See* Exhibit 9. Mr. Layman is referred to
 2 as the "Maker" of the Warrant and PPFF is referred to as the "Holder." *See* Exhibit A.

3 As consideration for the rights PPFF received under the Warrant, Mr. Layman
 4 received 72.3% of the closing bid price of the Symantec stock on April 6, 1990, or
 5 \$329,400. The Warrant contemplated that he would receive an additional 55.6% of the
 6 April 6, 1990 closing bid price upon purchase of the shares by PPFF under the Warrant.
 7 *See* Exhibit A, Warrant at page 1. As contemplated under the terms of the Warrant, Mr.
 8 Layman signed and delivered the stock power forms for the first 22,500 shares of Symantec
 9 stock to State Street, PPFF's custodian.¹ *See* Exhibit 5 at Layman 000025, 000041. Under
 10 the Warrant generally (and Article 5 in particular), Mr. Layman had an obligation to deliver
 11 stock power forms for any additional shares created by a stock split or other corporate
 12 transaction to State Street. *See* Exhibit A. He failed to do so despite PPFF's requests that
 13 he do so. *See* Motion at 2; Declaration of Michael J. Cuggino, filed herewith, ("Cuggino
 14 Decl.") at ¶¶ 3, 11, 12 and 16 and Exhibits J, L and M.

15 Article 2.2 of the Warrant states that upon any subdivision or dividend of the
 16 underlying shares of Symantec stock, other than a cash dividend payable out of current
 17 earnings, the "holder of [the] Warrant [PPFF] shall thereafter . . . be entitled . . . to
 18 purchase" the additional shares created by such subdivision or dividend. Through stock
 19 splits or other corporate transactions involving Symantec stock between 1990 and 2005,
 20 the number of shares that PPFF was entitled to purchase under the Warrant had grown to
 21 360,000. *See* Exhibit 1, Complaint at ¶ 8; Cuggino Decl. at ¶ 4 and Exhibit B. No later
 22 than November 2004, PPFF indicated to Mr. Layman that it was interested in exercising its
 23 rights under the Warrant. *See* Cuggino Decl. at ¶ 5 and Exhibit C. PPFF affirmed this

24 _____
 25 ¹ The stock power forms are referred to as "stock assignments" in the Warrant. The terms "stock power
 26 forms" and "stock assignments" are synonymous and will therefore be used interchangeably. Such forms
 have the same effect: to authorize the transfer of ownership.

1 interest in an email communication on March 8, 2005. *See* Cuggino Decl. at ¶ 6 and
2 Exhibit D. Between November 2004 and March 2005, the parties corresponded regarding
3 the shares and the Warrant, including discussions regarding stock certificates that were not
4 deposited with State Street until January 2005. *See* Cuggino Decl. at ¶¶ 4 and 5.

5 On or about March 10, 2005, PPFF transmitted to Mr. Layman its written Election
6 to Exercise the Warrant and purchase the full amount of Symantec stock that it was entitled
7 to purchase under the Warrant. The Election to Exercise stated that PPFF elected to
8 purchase from Mr. Layman 360,000 shares of Symantec stock at a purchase price per share
9 of \$0.695 for an aggregate price of \$250,200. The Election to Exercise also stated that the
10 closing date and time for the transaction would be March 25, 2005 at 4:00 p.m. (E.S.T.).
11 PPFF advised Mr. Layman that the purchase price would be paid and the Warrant
12 surrendered at the time of the closing and requested that Mr. Layman contact the President
13 of PPFF to coordinate the closing. *See* Cuggino Decl. at ¶ 7 and Exhibit E at Layman
14 000090. Mr. Layman never contacted PPFF to coordinate the closing. Nevertheless, on or
15 about March 15, 2005, Michael J. Cuggino ("Cuggino"), the President and Treasurer of
16 PPFF, contacted Mr. Layman by telephone to confirm his receipt of the Election to
17 Exercise. *See* Cuggino Decl. at ¶ 9 and Exhibit G. In addition, in an email communication
18 on or about March 23, 2005, PPFF notified Mr. Layman that State Street had informed
19 PPFF that Plaintiff must complete certain stock power forms for the Symantec shares
20 before the stock could be transferred into PPFF's name. *See* Cuggino Decl. at ¶ 10 and
21 Exhibit H. PPFF requested that Mr. Layman execute the stock power forms and return
22 them to State Street. *Id.* PPFF informed Mr. Layman that, after receipt of the stock power
23 forms, PPFF would surrender the Warrant and convey a certified check for the purchase
24 price to Mr. Layman. *Id.* PPFF was prepared to close the transaction on or about March
25 25, 2005 and had procured a certified check in the amount of the purchase price and the
26 original copy of the Warrant from State Street in order to effectuate the closing. Both of

1 these items were in PPF's possession at its headquarters in San Francisco on or about
 2 March 25, 2005. *See* Cuggino Decl. at ¶ 18 and Exhibit P.

3 Between March 23, 2005 and April 13, 2005, PPF attempted, telephonically and
 4 via email correspondence, to coordinate with Mr. Layman regarding his execution and
 5 submission of the stock power forms required by State Street and to coordinate the closing
 6 of the stock purchase transaction. *See* Cuggino Decl. at ¶ 11 and Exhibits J-K. Mr.
 7 Layman responded on April 12, 2005, stating that he would not provide the forms until he
 8 received a check. *See* Exhibit J at Layman 0000109. On or about April 13, 2005, PPF
 9 and Mr. Layman agreed that all remaining matters related to the stock purchase transaction
 10 would occur at the same time, and that they would exchange the stock power forms, the
 11 original Warrant and a certified check for the amount of the purchase price at a mutually
 12 convenient time. *See* Cuggino Decl. at ¶ 12 and Exhibit L at Layman 000110-000113 and
 13 Exhibit M. On May 4, 2005, the parties agreed that the closing of the stock purchase
 14 transaction would occur at a May 12, 2005 in-person meeting between Mr. Layman and
 15 Clement M. Wallace, the Secretary of PPF, in Palo Alto, California. *See* Cuggino Decl. at
 16 ¶ 13 and Exhibit N. There was additional correspondence regarding this meeting. *See*
 17 Cuggino Decl. at ¶¶ 12, 14 and Exhibits L and O.

18 The closing never occurred, however, because Mr. Layman filed the Complaint in
 19 this action on May 10, 2005. At no time prior to May 10, 2005, did Mr. Layman assert
 20 that he was not obligated to provide the signed stock power forms required by State Street.
 21 *See* Cuggino Decl. at ¶ 15. Further, at no time prior to May 10, 2005, did Mr. Layman
 22 allege that PPF had failed to exercise properly and timely its option to purchase the
 23 Symantec stock under the Warrant. *Id.*

24 **III. ARGUMENT**

25 **A. The Summary Judgment Standard.**

26 Plaintiff is entitled to summary judgment only if he can "show that there is no

genuine issue as to any material fact and that [he] is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). *See also Assurance Co. of America v. Wall & Assoc. LLC of Olympia*, 379 F.3d 557, 560 (9th Cir. 2004); *Score LLC v. Shoreline*, 319 F. Supp. 2d 1224, 1228 (W.D. Wash. 2004). As the moving party, Plaintiff “bears the initial burden of demonstrating the absence of a genuine issue of material fact.” *Score*, 319 F. Supp. 2d at 1228 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)). Additionally, the facts submitted in the record, and all reasonable inferences to be derived from them, shall be considered in the light most favorable to PPFF. *Gray v. Pierce County Housing Authority*, 123 Wash. App. 744, 751, 97 P.3d 26, 28 (2004) (citing *Wood v. Battle Ground Sch. Dist.*, 107 Wash. App. 550, 557 (2001)).

Mr. Layman fails to meet the summary judgment standard in all respects. As reflected above, Mr. Layman’s view of the facts differs in virtually every material respect from that of PPFF. These marked disputes require that the Court deny Plaintiff’s Motion.

B. Mr. Layman’s Primary “Facts” Are Disputed.²

In his Motion, Mr. Layman offers four primary “undisputed facts” in an attempt to deflect his responsibility for delaying the closing of the transaction. None of these facts is undisputed as Mr. Layman contends.

First, Mr. Layman claims that the Warrant was “drafted by the Fund.” *See* Motion at 2. (citing the Complaint at ¶ 4 and the Counterclaim at ¶ 7). In doing so, he purports to rely on the Complaint and the Counterclaim; however, neither of those pleadings supports his contention. PPFF contests this claim, and offers numerous documents that contradict it:

- Letter, dated February 28, 1990, from Mr. Layman to Coxon reflecting revisions he

² PPFF’s Counterclaim asserts four distinct counts, or causes of action, against Mr. Layman. In a footnote at the beginning of his Motion, Mr. Layman acknowledges that he has not addressed all of these counts and is seeking summary judgment on the single issue of adequacy of notice under the Warrant. Motion at 2, note 1.

1 wanted to the Warrant. Richman Decl. at ¶ 10 and Exhibit 9 at Layman 000002-
2 000004.

- 3 • Letter, dated March 13, 1990, from Rolnick to Mr. Layman reflecting
4 communications about the draft of the Warrant. Richman Decl. at ¶ 10 and Exhibit
5 9 at Layman 000005- 000006.
- 6 • Facsimile from Mr. Layman to Coxon regarding “finishing” the Warrant. Richman
7 Decl. at ¶ 10 and Exhibit 9 at Layman 000023.
- 8 • Facsimile from Mr. Layman to Rolnick regarding revision. Richman Decl. at ¶ 10
9 and Exhibit 9 at Layman 000024.
- 10 • Warrant, dated April 6, 1990, stating that Mr. Layman is the “Maker” of the
11 agreement and PPFF is the “Holder” of the agreement. Cuggino Decl. at ¶ 3 and
12 Exhibit A.

13 This record establishes that Mr. Layman not only materially contributed to the
14 drafting of the Warrant but, in fact, made several and substantial changes to it. *See*
15 Richman Decl. at ¶ 10 and Exhibit 9. Moreover, Mr. Layman was represented by counsel
16 in all matters related to the negotiation and drafting of the Warrant. *Id.*

17 Second, Mr. Layman claims that the Warrant clearly states that the Warrant could
18 only be exercised by providing the purchase price and surrendering the original Warrant by
19 “the April 6, 2005 deadline.” *See, e.g.,* Motion at 3. Plaintiff’s repeated references to the
20 April 6, 2005 date as a “deadline,” *see, e.g.,* Motion at 1-4 and 9, are unavailing. The
21 Warrant contains no such deadline. Indeed, Article 1.2 of the Warrant entitled “Method of
22 Exercise” contains no requirement of payment, no reference to any deadline, and no
23 mention of any date, let alone April 6, 2005. *See* Exhibit A, Warrant at page 2-3. Contrary
24 to Mr. Layman’s assertions, payment of the purchase price and surrender of the Warrant
25 were therefore not conditions precedent to his obligation to deliver the required stock
26 power forms and close the stock purchase transaction contemplated by the Warrant.

1 The only mention of the April 6, 2005 date is in the introductory section of the
2 Warrant. *See* Exhibit A, Warrant at page 1-2. That section contains two references to a
3 specific date, the first of which states that “[u]pon lapse of this Warrant or failure to
4 exercise prior to April 6, 2005, the parties agree that the Warrant will have no further force
5 or effect.” Exhibit A, Warrant at page 2. The Warrant also states that PPFF “is entitled,
6 subject to the terms and conditions hereinafter set forth, at any time on or after the date
7 hereof to and including April 6, 2005, to purchase from time to time up to 22,500 shares of
8 unrestricted Common Stock . . . of Symantec Corporation.” Exhibit A, Warrant at page 1.
9 However, Mr. Layman’s contention that the Warrant provides that PPFF must “tender [the
10 purchase price and the original Warrant] to Layman prior to the April 6 deadline” is simply
11 erroneous.

12 PPFF further contests this “fact” because the communications and documents
13 exchanged by the parties contradict the notion that either party intended or considered
14 April 6, 2005 to be a “deadline” for closing the stock purchase transaction. *See* Cuggino
15 Decl. at ¶¶ 11-14 and Exhibits J-O; Richman Decl. at ¶ 10 and Exhibit 9. In particular,
16 after April 6, 2005, the parties continued to communicate regarding the closing. Thus, Mr.
17 Layman’s perception that the April 6 date was a “deadline” apparently was formed at some
18 time after April 6. As discussed below, PPFF maintains that the Warrant is clear and
19 unambiguous that the closing did not need to occur before April 6, 2005, but could occur
20 within a reasonable time of exercise. Instead, notice was the only matter which PPFF
21 admits needed to (and did) occur before April 6, 2005. At best, the Warrant is ambiguous
22 with regard to what actions needed to occur before April 6, 2005. In any event, the timing
23 element of the Warrant and the requirements for exercise thereunder are clearly in dispute.
24 PPFF was, at all times, prepared to purchase the shares on or after March 25, 2005, that is,
25 within a “reasonable” time period. *See* Cuggino Decl. at ¶ 18 and Exhibit P.

26 Third, Plaintiff claims that PPFF’s request that Mr. Layman execute power of

1 attorney forms “was a departure from procedure described in the Warrant.” *See* Motion at
2 4, note 2. Once again, PPFF disagrees. In fact, the Warrant contemplates that
3 “assignments executed in blank” will be completed for each stock certificate, *see* Exhibit
4 A, Warrant at page 10, Article 5, and that Mr. Layman will “assist in the carrying out of all
5 [the terms of the Warrant] and [will] tak[e] . . . all such action as may be necessary or
6 appropriate in order to equitably protect the rights of the holder or holders.” *See* Exhibit A,
7 Warrant at page 9, Article 2.7. Mr. Layman breached these provisions by failing to assist
8 in carrying out the terms of the Warrant, by failing to respond timely to PPFF’s Election to
9 Exercise its rights to purchase the Symantec stock, by failing to execute the stock power
10 forms required by State Street to effect the purchase by PPFF, by delaying the closing of
11 the stock purchase transaction and by refusing repeated requests by PPFF for his assistance
12 in completing the transaction. The Warrant also provides that “[e]ach of the parties agrees
13 to perform such other and further acts as shall be necessary to effectuate the rights of the
14 other party to this Warrant.” Exhibit A, Warrant at page 10, Article 4. Mr. Layman
15 breached Article 4 of the Warrant because he failed to perform acts “necessary to
16 effectuate” PPFF’s rights to purchase the Symantec stock.

17 Significantly, Mr. Layman never disputed prior to May 10, 2005, that he was
18 obligated to provide the required stock power forms. Mr. Layman’s delay in executing the
19 forms was one of the factors that deferred the closing date. While the Warrant did not
20 specify when the stock power forms were supposed to have been completed, it did
21 contemplate that Plaintiff would “perform . . . acts as shall be necessary to effectuate the
22 rights of the other party to this Warrant.” Exhibit A, Warrant at page 10, Article 4. The
23 execution and delivery of the stock power forms was clearly something that was “necessary
24 to effectuate” PPFF’s right to purchase the stock.

25 Finally, Mr. Layman’s argument that his execution of the stock power forms
26 “would have put the Fund in legal control of the stock certificates before the Fund had fully

1 paid the Purchase Price” is incorrect and inapposite. *See* Motion at 4, note 2. PPFF and
 2 Mr. Layman agreed to exchange the power of attorney forms and the purchase price and
 3 original Warrant at the closing. *See* Cuggino Decl. at ¶ 12 and Exhibit L. This obviated
 4 any theoretical concern that PPFF would attempt to procure control of the stock without
 5 proper payment.

6 **C. Plaintiff’s Case Citations Are Inapposite and Unavailing.**

7 None of the cases cited by Mr. Layman supports his view of how the Warrant
 8 should be interpreted or the instant Motion. In particular, Mr. Layman primarily relies on
 9 cases that are not analogous to the facts of this case. The cases cited by Mr. Layman
 10 generally stand for the proposition that an optionee must strictly comply with the terms of
 11 an option contract. *See* Motion at 6-7.³ PPFF does not dispute this broad principle.
 12 However, these cases do not address the central issues in this case. All of Mr. Layman’s
 13 case citations are readily distinguishable for the reasons set forth below.

14 **1. PPFF Strictly Complied with the Terms of the Warrant.**

15 As noted, Mr. Layman cites a number of cases for the principle that the terms of an
 16 option contract must be strictly followed. *See* Motion at 6-7 (citing *Palo Alto Town &*
 17 *Country Village, Inc. v. BBTC Company*, 11 Cal. 3d 494, 521 P.2d 1097 (1974); *State ex*
 18 *rel Carriger v. Campbell Food Markets, Inc.*, 65 Wash. 2d 600, 398 P.2d 1016 (1965);
 19 *Gatley v. Shockley*, 215 Cal. 604, 12 P.2d 436 (1932); *Wilson v. Ward*, 155 Cal. App. 2d
 20 390, 317 P.2d 1018 (1957); *Andersen v. Brennen*, 181 Wash. 278, 43 P.2d 19 (1935)).
 21 Significantly, Plaintiff dedicates little attention or analysis to the facts or underlying legal
 22 principles addressed in these cases. A more thorough examination of the holdings in these
 23 cases reveals that they are uniformly unavailing to Mr. Layman.

24 ³ PPFF agrees with Mr. Layman’s contention that California and Washington substantive law are consistent
 25 with respect to the issues related to this Motion. PPFF does not concede any choice of law issues, however.
 26 Because the Court need not reach any determination on choice of law in order to decide the Motion, PPFF
 respectfully reserves the right to raise any choice of law issues at a later time.

1 For instance, *Palo Alto* primarily deals with two issues, neither of which is relevant
 2 to the present dispute. The first is whether notice is effective upon receipt or upon
 3 dispatch. This matter is not at issue because the parties do not dispute that PPFF provided
 4 to Mr. Layman a timely Election to Exercise. The second issue is what means an optionee
 5 may use to provide notice when the contract does not contain specific terms. The court
 6 spends the majority of its opinion discussing why the terms of the option were not clear
 7 and evaluating whether the optionee's notice was sufficient. The court holds that, under
 8 California statutory law, written notice by regular mail sufficiently complies with an option
 9 that does not clearly describe how the optionee should effectuate notice. This holding does
 10 not speak to the issues presented by the Motion.

11 In *Carriger*, the issue was whether an acceptance that was conditional on terms
 12 outside of the option converted the acceptance into a counteroffer. The court held that an
 13 acceptance must be on the same terms as contained in the option. *Carriger* is not relevant
 14 to this case because PPFF's request – that Mr. Layman execute the stock power forms –
 15 was not a condition outside of the Warrant. In fact, Mr. Layman agreed that he was
 16 required to execute these forms, without which PPFF could neither convert the shares, nor
 17 take possession of them, as contemplated by the Warrant. Cuggino Decl. at ¶ 10.
 18 Moreover, Mr. Layman was required, by the terms of the Warrant, to complete these forms.
 19 See Exhibit A, Warrant at pages 9-10, Articles 2.7, 4 and 5. For these reasons, *Carriger* is
 20 irrelevant.

21 In *Gatley*, much like in *Carriger*, the optionee violated the explicit terms of the
 22 option by attempting to assign the option to another company. Additionally, the optionee
 23 failed to make a deposit as called for in the option. See *Gatley*, 215 Cal. at 608-09, 12 P.2d
 24 at 438. The option set forth that a \$5,000 deposit was to be paid at a particular time and
 25 then specified how the remainder of the purchase price was to be paid. This case, like *Palo*
 26 *Alto* and *Carriger*, is inapplicable for factual reasons. The *Gatley* court, in finding that the

1 optionee had tendered improperly, relied on the fact that the optionee attempted to
 2 construct a “sham transaction” because the optionee, a company, was defunct when it
 3 attempted to tender. Instead, another company provided the funds for the deposit. Unlike
 4 in *Gatley*, the Warrant contains no requirement regarding the payment of any deposit
 5 beyond the consideration that PPFF paid, in 1990, to obtain its rights under the Warrant. In
 6 addition, PPFF has not attempted to thwart any of the contractual provisions, unlike the
 7 optionee in *Gatley*.

8 The optionee in *Wilson* argued that his failure to provide the purchase price by the
 9 date set forth in the option was not a “belated attempt to exercise the option . . . but merely
 10 a demand for performance” of the optionor. *Wilson*, 155 Cal. App. 2d at 394, 317 P.2d at
 11 1020. The court held that the option was contingent on the payment of a sum certain by a
 12 particular date in light of contractual terms that stated: “If the said payment of \$6,500.00 is
 13 not paid or tendered on or before the First day of May, 1954, then this contract [is] to be
 14 void and of no effect, and both parties released from all obligations herein.” *Id.*, 155 Cal.
 15 App. 2d at 395, 317 P.2d at 1021 (emphasis added). Because that condition precedent
 16 never came about, the option became void and the parties were released from their
 17 obligations. The court explicitly states that the optionee’s payment was made an “essential
 18 condition to the exercise of the option.” *Id.* Unlike in *Wilson*, payment of the purchase
 19 price was not an “essential condition” of the exercise of the Warrant.⁴ Indeed, as noted
 20 above, the Warrant is silent with respect to the date by which payment must be made by
 21 PPFF.

22 The *Wilson* court cites two cases, *Cates v. McNeil*, 169 Cal. 697, 147 P.2d 944
 23 (1915) and *Murfee v. Porter*, 96 Cal. App. 2d 9, 214 P.2d 543 (1950), that are particularly

24 ⁴ Significantly, *Wilson* is further distinguished from this case because PPFF did not delay in exercising under
 25 the Warrant, unlike the optionee in *Wilson*. Any delay in executing the closing was attributable to inattention
 26 or non-responsiveness on the part of Mr. Layman or the parties’ agreement to “close” the stock purchase
 transaction on May 12, 2005. See Cuggino Decl. at ¶ 11.

1 helpful in examining when a condition is “essential” to an option. In both of these cases,
2 the court held that payment was not an essential condition. Unsurprisingly, despite the fact
3 that *Cates* and *Murfee* are far more analogous to the present dispute, Plaintiff cites neither
4 of these opinions.

5 In *Cates* the lessee-optionee was granted an option to purchase real property within
6 a specified time period. Before that period ended, the optionee served written notice of its
7 intent to purchase and a willingness to pay the price set forth in the contract. The optionor
8 did not object to the notice, but refused to execute the purchase. The court held that
9 payment of the purchase price was not an explicit part of the conditions required in order to
10 exercise the option, despite the fact that the option gave the optionee the right to purchase
11 the leased premises for a certain price per acre by a certain date. Payment, according to
12 the court, was not an “essential condition” to the exercise of right. *Cates*, 169 Cal. at 705-
13 06, 147 P.2d at 947-48. The court stated that while payment would be required before the
14 optionee would be entitled to conveyance of the property, payment pertained to the
15 “performance of the contract” and not to the “acceptance.” *Id.* Instead, the court
16 concluded that the optionor and optionee must perform the “mutual and dependent
17 covenants” related to the purchase, including conveyance of the purchase price, within a
18 “reasonable time” after the contract for sale is created by acceptance of the option. *Cates*,
19 169 Cal. at 706-07, 147 P.2d at 948.

20 Here, as in *Cates*, the terms of the Warrant do not explicitly require payment as a
21 condition to exercise. Instead, the payment of the purchase price and surrender of the
22 Warrant pertain to the closing of the purchase and not to “exercise” or “acceptance.” Mr.
23 Layman’s assertion to the contrary is not supported by fact or law. Additionally, contrary
24 to Mr. Layman’s strained contentions, PPFF made no extra-contractual requests in the
25 election or at any later time. Like the optionee in *Cates*, PPFF made requests relating to
26 the performance of the option and Mr. Layman’s contractual obligations, after the

1 unconditional notice had been transmitted.

2 In *Murfee*, the court discusses another relevant issue – the problem of determining
3 the parties' intent when an option contract confers an option which must be exercised
4 before a specific time, but is silent about the exact time required for the tender or payment
5 of the purchase price. The *Murfee* court observed that one of the "generally accepted legal
6 principles," is that "payment or tender is not essential unless it is a condition precedent,"
7 and that "if no time is specified the acceptance must be within what is a reasonable time
8 under the circumstances of the particular case. The principle that time is of the essence of
9 an option generally applies only to acceptance and not to performance." *Id.*, 96 Cal. App.
10 2d at 18, 214 P.2d at 549 (citations omitted).⁵

11 The circumstances here are analogous to those in *Murfee*. Although there was a
12 general date specified in the Warrant, the instructions regarding exercise did not contain
13 any specific requirement that the purchase price be paid on or before a date certain, nor did
14 the section of the Warrant referring to April 6, 2005 explicitly state that the purchase must
15 be completed by that date. See Exhibit A, Warrant at pages 2-3, Article 1.2. Thus,
16 payment of the purchase price and surrender of the original Warrant were not made
17 "essential conditions" to the right to exercise.⁶ The parties' intent under a contract is
18 determined from the language of the contract and from the surrounding circumstances,
19 including the "subsequent acts and conduct of the parties to the contract." *Scribner v.*
20 *Worldcom, Inc.*, 249 F.3d 902, 907-08 (9th Cir. 2001) (applying Washington law) (internal
21

22 ⁵ The *Murfee* court distinguishes two cases, one of which is cited by Plaintiff to support the notion that strict
23 compliance requires more than "mere" notice. See *Mariposa Commercial & Mining Co. v. D. L. Peters*, 215
24 Cal. 134, 8 P.2d 849 (1932). *Murfee* distinguishes *Mariposa* on the basis that the *Mariposa* option contains
25 two separate and specific dates, one for the notice of election and one for tender of the purchase price.

26 ⁶ See also *Erich v. Granoff*, 109 Cal. App. 3d 920, 928-29 (1980) ("[I]t is generally recognized that payment
of the purchase price in an option contract is, unless otherwise stated in the contract, an obligation to be
performed by the optionee in his performance of the conditions of the bilateral contract of purchase and sale
which is formed upon the exercise of the option.").

quotation omitted). Here, the parties' intent is clear from both the language of the Warrant and from the parties' actions after PPFF provided its written Election to Exercise. The parties intended for the contract to close within a reasonable time after notice was provided, but there was no strict requirement that the closing occur before April 6, 2005, as is exhibited by Plaintiff's continued correspondence with PPFF regarding the closing date up to and until the Complaint was filed on May 10, 2005.⁷ See Cuggino Decl. at ¶¶ 11-14 and Exhibits J-O. Plaintiff never expressed that PPFF had missed the date for payment. Instead, his only focus appeared to be whether or not the power of attorney forms needed to be transferred before or after payment was received. *Id.*

Andersen is also distinguishable. In *Andersen*, the option concerned a stock repurchase agreement, which contemplated that, upon ninety days prior notice of the optionee, the optionor would repurchase 110 shares of stock that optionee received in an earlier transaction with optionor. The option stated that the contract would continue for three years from the date of the original written agreement, April 8, 1929. The optionee argued that he had given the optionor written notice on April 6, 1932 or, in the alternative, had given oral notice on March 26, 1932, of his intent to exercise the option. The court held that the optionor was obligated to purchase the stock "at any time within the three year period, provided that, within that period, the appellant had given ninety days notice of his election." *Andersen*, 181 Wash. at 281, 43 P.2d at 21. The court also held that the "ninety day notice was a condition precedent to appellant's right of action for specific

⁷ Under Washington and California law, the purchase could be consummated within a reasonable time, without running afoul of the terms of the Warrant. See, e.g., *Duprey*, 52 Wash. 2d at 134, 323 P.2d at 906; *Murfee*, 96 Cal. App. 2d at 17, 214 P.2d at 549. "If the condition is only that notice shall be given within a certain time, and no time is specified for the making of payment, a delay in paying is not fatal to the option holder. When option contracts do not explicitly require payment of the purchase price as a condition precedent to exercise of the option, such agreements simply require a promise by the option holder to pay the price (and not actual payment) and intend performance to be completed thereafter within a reasonable time." 3 Corbin on Contracts § 11.14 and notes 20 & 21 at page 616 (West 1996 & 2005 Supp.) (emphasis added).

performance.” *Id.*⁸ Clearly, the current action can be distinguished on the basis that PPFF, contrary to the optionee in *Andersen*, did give notice within the prescribed period. Even assuming the facts in the light most favorable to Plaintiff, PPFF would have had to serve Mr. Layman with notice fourteen (14) days before April 6, 2005. In fact, PPFF served Plaintiff with notice twenty-seven (27) days before April 6, 2005. Therefore, unlike the optionee in *Andersen*, PPFF did not fail to perform any conditions precedent to its rights for specific performance.

Furthermore, in contrast to the optionor’s actions in *Andersen*, Mr. Layman did not reject PPFF’s tender under the Warrant. Instead, Plaintiff’s responses to PPFF’s email and telephonic communications gave every indication and assurance that the purchase would close on May 12, 2005. *See* Cuggino Decl. at ¶¶ 13-14 and Exhibits N-O. To PPFF’s surprise, on May 10, 2005, Plaintiff for the first time claimed that PPFF should have provided the purchase price and surrendered the original Warrant before April 6, 2005. *See* Cuggino Decl. at ¶ 15; Exhibit 1, Complaint at ¶ 14. Assuming for the sake of argument that Plaintiff is correct and PPFF’s tender of exercise was insufficient under the terms of the Warrant, Mr. Layman has waived improper notice by virtue of his failure to permit PPFF an opportunity to cure any alleged defect in its tender. *See, e.g., Rollins v. Stokes*, 123 Cal. App. 3d 701, 713 (1981) (“If an optionor does not specify the alleged defects in the tender by the optionee, then a waiver results. . . . The reason for this rule is that an optionee should be able to remedy any defects in his tender and prevent the optionor from remaining silent at the time of the tender and later surprise the optionee with hidden objections.”) (citation omitted); *Collins v. Marvel Land Co.*, 13 Cal. App. 3d 34, 40 (1970)

⁸ Despite being decided more than 70 years ago, *Andersen* has been cited only twice in relevant jurisdictions. *See Paul v. Christensen Family Trust*, 2005 Wash. App. LEXIS 1876 (July 26, 2005) and *In re Kofoed*, 46 F. Supp. 118 (D. Wash. 1942). Neither of these cases, nor *Andersen* itself, truly supports the suggestion Plaintiff posits that “failure to complete transaction within the time of the option resulted in option terminating.” Motion at 6; *see also* Motion at 8, note 4. Instead, these cases support that “time is of the essence” and that notice must be given timely. *Paul*, 2005 Wash. App. LEXIS 1876, at *8; *In re Kofoed*, 46 F. Supp. at 120.

1 (“The acceptance of the exercise of the option without objection to the form of the exercise
 2 waives any objection to the form of the exercise.”) (citations omitted); *Lawrence v. Settle*,
 3 182 Cal. App. 2d 386, 388 (1960) (even if oral exercise of the option was ineffective,
 4 optionor by his conduct waived this defect because he did not object to the form of the
 5 offer, despite his refusal to accept the offer).⁹ For this additional reason, *Andersen* is
 6 unavailing to Plaintiff.

7 **2. The Notice by PPF Was Sufficient.**

8 Plaintiff cites additional authorities to support the contention that when an option
 9 requires the performance of certain actions in order to effectuate exercise, “mere notice” of
 10 the intent to exercise is “insufficient and the option will terminate.” *See* Motion at page 6
 11 (citing *Fabares v. Benjamin*, 180 Cal. App. 2d 264 (1960); *Mariposa Commercial &*
 12 *Mining Co. v. D. L. Peters*, 215 Cal. 134, 8 P.2d 849 (1932)). These cases also are
 13 irrelevant and unavailing.

14 In *Fabares*, the parties disputed whether an option regarding the sale of real
 15 property clearly required that as a “condition to exercise” the optionee was required to pay
 16 the optionor \$58,500, as partial payment for a debt that was outstanding to the optionor.
 17 The optionee did not dispute that he failed to pay the money to the optionor, but argued
 18 that it was not a condition to exercise and, instead, that notice of exercise was sufficient.
 19 The court stated that by “clear and unmistakable language” the payment of the \$58,500 was
 20 required as a “prepayment” in order to exercise the option. *Fabares*, 180 Cal. App. 2d at

21 ⁹ *See also* 3 Corbin on Contracts § 11.8 at page 524 (“Even if an option is given or an offer is made in such
 22 terms that acceptance is to be by actual payment and not by mere notice, it may still be clear that conveyance
 23 and payment are intended to be concurrent The vendor will be held bound if the purchaser gives notice
 24 of acceptance and offers to produce the money in exchange for the deed, then having the necessary funds in
 25 the bank to cause the purchaser’s check to be honored.”). PPF was prevented from closing the transaction
 26 because of Plaintiff’s delay tactics and the filing of this lawsuit. Mr. Layman’s actions should not be
 permitted to prejudice PPF. Because, as set forth in Plaintiff’s Motion, Plaintiff is seeking summary
 judgment only on PPF’s claim that the Election to Exercise constituted exercise under the Warrant, PPF
 will not address this argument, nor will PPF address any of its other counterclaims, as Plaintiff has agreed,
 these are dependent on the consideration of disputed facts. PPF reserves the right to seek a determination as
 to these issues at a later time.

270. Moreover, the court noted that well in advance of the exercise date, the optionor's attorney sent a letter to the optionee specifying the defective notice and stating that the optionee must, "as a condition precedent to exercise, pay the \$58,500." *Id.* at 271. In contrast to *Fabares*, the language in the Warrant is not "clear and unmistakable" that the purchase price is a "condition to exercise" and must be paid and the Warrant surrendered on or before April 6, 2005. Moreover, unlike the optionor in *Fabares*, Plaintiff did not notify PPFF that it had insufficiently exercised.

Mariposa, a case that Plaintiff claims "mirrors the circumstances here," (*see* Motion at 7) concerned a real estate contract that contained two explicit and distinct dates, one for notice of election (November 25, 1929) and the other for the effectuation of purchase (November 30, 1929). The court held that the optionee failed to tender the purchase price, as contemplated by the option, by November 30, 1929, that the optionee was in default of other provisions of the option and that, therefore, the optionee failed to comply with the terms of the option whereupon it terminated. The facts of *Mariposa* quite obviously do not mirror the circumstances of this case. Unlike the optionee in *Mariposa*, PPFF did not fail to comply with the terms of the Warrant. PPFF properly gave notice within the appropriate timeframe. The absence of a provision in the "Method of Exercise" section of the Warrant specifying that the purchase price must be paid and the Warrant surrendered on or before a date certain distinguishes *Mariposa*, in which there was such a condition. In addition, unlike in *Mariposa*, the section of the Warrant regarding exercise does not clearly specify two separate dates for notice and effectuation of the purchase.

3. PPFF is Not Seeking to Extend the Deadline of the Warrant.

Contrary to the suggestion by Plaintiff, PPFF is not attempting to extend the option embodied by the Warrant. Indeed, as Plaintiff was well aware, PPFF was prepared to release the certified check for the purchase price and surrender the original Warrant before April 6, 2005. *See* Cuggino Decl. at ¶ 18 and Exhibit P. Notice was provided within the

1 time period provided for in the Warrant. Plaintiff may not complain at this late date that a
 2 provision that he had a significant hand in drafting should be construed differently than the
 3 parties intended and than his own actions portended. *See* Richman Decl. at ¶ 10 and
 4 Exhibit 9.¹⁰

5 The cases relied upon by Plaintiff in this area also are readily distinguished. *See*
 6 Motion at 7 (citing *Simons v. Young*, 93 Cal. App. 3d 170, 155 Cal Rptr. 460 (1979);
 7 *Wilson v. Ward*, 155 Cal. App. 2d 390, 317 P.2d 1018 (1957); *Gray v. Lipscomb*, 48 Wash.
 8 2d 624, 296 P.2d 308 (1956)).¹¹ In *Simons*, the lessee-optionee had a lease that he was
 9 required to renew in writing within a specific time period. After that time period had
 10 lapsed, the lessor and successor to the optionor, notified the optionee that his option had
 11 lapsed. Optionee thereafter attempted to renew the lease. Upon lessor's refusal to accept
 12 notice, optionee filed an action requesting specific performance and equitable relief. The
 13 optionee acknowledged that he failed to provide written notice within the period specified
 14 in the option. The court held that it could not extend the option period and that it could not
 15 grant the optionee equitable relief when the optionee's "failure to exercise the option
 16 resulted entirely from his own neglect or forgetfulness and was not contributed to by
 17 lessors." *Simons*, 93 Cal. App. at 188, 155 Cal. Rptr. at 472. Clearly, *Simons* is unlike the
 18 current situation. Unlike the optionee in *Simons*, PPFF did not neglect or fail to exercise
 19 its rights under the Warrant. In addition, PPFF has not requested that the Court relieve it of

20 ¹⁰ Washington law clearly supports this contention. *See, e.g., Duprey*, 52 Wash. 2d at 134, 323 P.2d at 906.
 21 In *Duprey*, the Washington Supreme Court held that when an option contract stated that the lessee-optionee
 22 had a "right and option to purchase [a parcel of] real estate at any time within the term of this lease for a total
 23 purchase price of \$12,500 in cash," this did not necessitate that the purchase price be tendered at the time of
 24 the exercise. Instead, "[w]hen, as here, no time is specified in the option agreement for final payment and
 25 delivery of the instruments of conveyance, the time of payment and delivery is a reasonable time after
 26 acceptance of the offer There is a distinction between an acceptance of an offer to purchase and the
 closing of a sale, after the option has been exercised. The acceptance of an offer to sell . . . creates a binding
 obligation on both parties. The closing of the sale thereafter is the fulfillment of the obligations created by
 the contract." *Id.* (citation omitted).

¹¹ Although it is not within the scope of this motion, PPFF's waiver argument applies to this contention as well. Again, PPFF reserves the right to raise this argument at a later time.

1 any requirements under the Warrant. Finally, PPFF has not requested additional time to
2 exercise its rights under the Warrant. PPFF timely and effectively delivered its Election to
3 Exercise on March 10, 2005. Mr. Layman was aware that PPFF was willing and able to
4 complete the purchase on or after March 25, 2005. Therefore, the holding in *Simons* is
5 irrelevant.

6 As discussed above, *Wilson* is also distinguishable. The optionee in *Wilson* sought
7 an extra three days to comply with the terms of the option. PPFF did not seek additional
8 time to perform its obligations. Instead, PPFF timely exercised its rights under the
9 Warrant. If anyone sought additional time to comply it was Plaintiff, who failed to execute
10 and deliver the required stock power forms and failed to assist in closing the stock
11 purchase transaction, as required under the Warrant. *See* Cuggino Decl. at ¶¶ 4, 16 and
12 Exhibit B.

13 In *Gray*, the terms of the option set forth clearly and explicitly that the optionee
14 would be permitted to purchase a parcel of property on one particular day. The optionee
15 failed to exercise on the appointed day and sought to enforce the option by virtue of
16 estoppel based upon the fact that he had a “confidential relationship” with the optionor that
17 entitled him to expect that the optionor would not seek to strictly enforce the terms of the
18 option. The court held, among other things, that the optionor “did not make any
19 representations of fact in regard to the terms of the option, nor promise to enlarge its
20 duration” and that the optionees “were in no way induced to forgo action upon the option
21 by the statements of the [optionor]” on the basis that one of the optionees admitted that he
22 had “forgotten the terms of the option and that it had to be exercised on September 30,
23 1954.” *Gray*, 48 Wash. 2d at 627, 296 P.2d at 310. The court concluded that “no estoppel
24 arises from these facts.” *Id.* Contrary to *Gray*, PPFF did not sit on its rights and simply
25 forget to exercise its option under the Warrant. Instead, PPFF clearly provided proper and
26 timely written notice and relied on Plaintiff’s representations and agreements with respect

1 to the closing. Unlike the optionor in *Gray*, who immediately notified optionee that its
 2 notice was ineffective, Plaintiff never notified PPFF that its notice was ineffective and gave
 3 every indication that he was prepared to close the transaction on May 12, 2005.

4 **D. In the Alternative, the Motion Should be Denied Because Rule 56(f) Requires**
 5 **that PPFF Be Allowed To Take Discovery.**

6 A fourth, and equally meritorious, ground for denying the Motion is that it is
 7 premature. This case was filed on May 10, 2005. Last month, the parties filed a Joint
 8 Status Report setting forth the time for discovery and other matters. Plaintiff's Motion for
 9 Summary Judgment was filed not only before the completion of discovery, but also prior to
 10 the onset of discovery.

11 This is the paradigm case for application of Fed. R. Civ. P. 56(f), which authorizes
 12 the denial of a motion for summary judgment where the party opposing the motion has not
 13 had an opportunity to complete discovery relating to the subject matter of the summary
 14 judgment motion. *Burlington Northern Santa Fe R.R. Co. v. Assiniboine and Sioux Tribes*,
 15 323 F.3d 767, 773 (9th Cir. 2003) ("Where . . . a summary judgment motion is filed so
 16 early in the litigation, before a party has had any realistic opportunity to pursue discovery
 17 relating to its theory of the case, district courts should grant any Rule 56(f) motion fairly
 18 freely."¹² The discovery period in this action only recently commenced, and neither of the
 19 parties have served discovery requests. Those requests likely will address many of the
 20 disputed factual matters that are discussed in the Motion and this Opposition Brief.
 21 Additionally, PPFF anticipates that deposition testimony may be useful and/or necessary
 22 before the factual matters addressed by PPFF's Motion can be fully addressed and
 23 resolved. Under Fed. R. Civ. P. 56(f) and the controlling precedent, the incompleteness of
 24 the discovery process requires that the Motion be denied.

25 ¹² See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (a party's burden of producing
 26 evidence in response to a summary judgment motion does not even arise until that party has had a full
 opportunity to conduct discovery).

IV. CONCLUSION

For the reasons set forth above, Plaintiff's Motion for Partial Summary Judgment must be denied.

DATED this 8th day of September, 2005.

Respectfully submitted,



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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on September 8, 2005, I electronically filed the Defendant's
3 Opposition to Plaintiff's Motion for Partial Summary Judgment with the Clerk of the
4 Court using the CM/ECF system which will send notification of such filing to the
5 following:

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11 Because the pleadings related to the Opposition to Plaintiff's Motion for Partial
12 Summary Judgment exceeded 100 pages, I also filed a Courtesy Copy for Chambers of this
13 and all related pleadings with the Court. There are no parties that require manual service
14 on this case.

15 Executed at Seattle, Washington, this 8th day of September, 2005.

16 

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